Office-Supreme Court, U.S.
FILED
AUG 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-189

In the Supreme Court of the United States

OCTOBER TERM, 1984

STEPHANIE ERON,

Petitioner,

vs.

CITY OF MEQUON, TIMOTHY BRAATEN, RICHARD SCHNELL and JACK HOCKINSON and JOHN DOE and RICHARD ROE,

Respondents,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Seventh Circuit commit reversible error by affirming the decision of the trial court that the legality of the respondents' entry onto petitioner's premises was a question of fact, and therefore, not illegal as a matter of law?

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The respondents, City of Mequon, et al respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Seventh Circuit, filed May 9, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was filed May 9, 1984 and is set forth in the Appendix (A-1 - A-6).

STATEMENT OF THE CASE

Petitioner is the owner of a restaurant located in Mequon, Wisconsin. She sought relief under 42 U.S.C. 1983 for alleged violations of her constitutional rights by respondent police officers who entered her restarant to investigate suspected liquor law violations and arrested her for obstructing their investigation.

Trial before a jury was held on January 3 and 4, 1983. After the close of all the evidence and settlement on a special verdict to be presented to the jury, the plaintiff moved the trial court to answer the first question—whether respondents' entry onto petitioner's premises was illegal—"yes", based on the contention that there was no factual dispute concerning the circumstances of the entry. The trial court refused and submitted that question to the jury with the other questions. The jury returned a verdict against the petitioner on all questions. On motion after verdict, the petitioner repeated her claim that entry was illegal as a matter of law and requested a new trial. (A-7 - A-8). The trial court denied the motion by decision rendered January 9, 1983. (A-3 - A-6). From the decision and the verdict of the jury, the petitioner appealed to the United States Court of Appeals for the Seventh Circuit which affirmed and adopted as its own the decision of the trial court (A-1 - A-6). Petitioner prays that a writ of certiorari issue to review the Court of Appeal's decision to affirm the trial court's refusal to rule that respondents' entry onto her premises was illegal as a matter of law.

REASON FOR DENYING WRIT

The Legality Of Respondents' Entry Onto Petitioner's Premises Was A Question Of Fact And The Court Of Appeals Did Not Commit Reversible Error In Affirming The Trial Court's Decision To Submit Such Issue To The Jury

As the issue of whether respondents' entry onto petitioner's premises was consensual in nature constituted a question of fact, the trial court was correct in submitting the question to the jury. Petitioner wrests a few sentences from one trial exhibit out of the context of two days of trial proceedings to lend credence to her assertion that there was no factual dispute with regard to the legality of respondents' entry onto her premises. In doing so, petitioner not only mischaracterizes the timing of petitioner's and her agents' objection to the officers' presence on the premises, but she also disregards ample evidence supportive of the jury determination that the entry was consensual.

A tape recording made of the incident by one of the investigating officers was admitted into evidence and demonstrated that the officers did not merely force their way into the restaurant, but knocked repeatedly on the front door before petitioner's agent, Michelle Michaels, granted them access. (Tr. p. 152-53). Further, the testimony of one of the investigating officers, Thomas Luzinski, indicated that after petitioner's employee opened the door to the officers, she guided them to petitioner inside the restaurant.

> Q: And after the door was opened, can you tell us what was said between yourself and Miss Michaels?

A: I informed her that we wanted to speak to Mrs. Eron. We asked where Mrs. Eron was. Miss Michaels said, 'She's in the kitchen.'
Q: And then what happened after that?
A: We proceeded to the kitchen.

(Tr. pp. 100-101).

The tape recording of the incident reveals that it was only later, after petitioner's employee had led the officers to petitioner, and petitioner and her employees refused to cooperate with the officers, did petitioner order the officers to leave the premises (Tr. pp. 153-55). Clearly, once petitioner consented to the officers' entry, she could not subsequently rescind such consent because she did not want to cooperate with the officers. *United States* v. *Young,* 471 F.2d 109, 111 (7th Cir. 1972).

The question of whether consent has been given to a search is usually a question for the trier of fact. *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 222 (1973). In view of the testimony from Michaels that—contrary to what the tape recording of the incident revealed had actually transpired—she protested the police presence prior to petitioner's obstructive behavior in the restaurant kitchen area, the trial court correctly deemed the consent issue a question of fact.

Petitioner raises for the first time the question of whether it was within Michaels' authority to consent to respondents' entry. Absent exceptional circumstances, a reviewing court should not consider contentions not presented in the lower court. *Moore* v. *Illinois,* 408 U.S. 786 (1972); *Hormel* v. *Helvering,* 32 U.S. 552 (1941). Further, as the trial court's decision correctly noted, "when a third-party consents to search, question is whether he or she reasonably appeared to the officers to have authority to consent, *Young,* 471 F.2d at 111." (A.-5). And the question of whether an agent has the appearance to consent to a search is a question of fact. *United States* v.

Sells, 496 F.2d 912, 914 (7th Cir. 1974). Quite obviously, the trial court was correct in submitting the entire consent question to the jury.

As the foregoing demonstrates, the premise upon which petitioner's entire argument rests—that the entry was illegal as a matter of law—is based upon a misapprehension relative to the evidence adduced at trial. The erroneous premise renders petitioner's argument—largely a discourse on the purpose of the fourth amendment—irrelevant. Because of the presence of evidence indicating consensual entry, evidence the jury ultimately found persuasive, the trial court was compelled to send the issue to the jury for their consideration. The Court of Appeals in turn, recognizing that the trial record presented a question of fact with regard to the consensual entry issue, was compelled to confirm the trial court's refusal to transform a question of fact into a question of law.

CONCLUSION

Petitioner would not only have this court reweigh the facts presented in the trial record, but at the same time ignore, as she does, the ample evidence supporting the jury's determination that entry was consensual. The trial court refused to so usurp the role of the trier of fact, and the Court of Appeals recognized the propriety of the trial court's decision to so refuse.

In light of the above, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

BORGELT, POWELL, PETERSON & FRAUEN, S.C.

JOSEPH D. MCDEVITT
(Attorney of Record)
JAMES S. SMITH

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(SUBMITTED APRIL 4, 1984)*

May 9, 1984

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. LUTHER M. SWYGERT, Senior Circuit Judge

No. 83-2285

STEPHANIE ERON,

Plaintiff-Appellant,

vs.

CITY OF MEQUON, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 81-C-1302.
Myron L. Gordon, *Senior Judge.*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

Plaintiff brought suit pursuant to 42 U.S.C. § 1983 against the City of Mequon, Wisconsin, its police chief and several of its police officers. She alleged that the defendants caused her to be falsely arrested and that, in carrying out the arrest, the police officers entered her place of business illegally and used excessive force. Her arm was broken in the incident. A trial was held, and the jury retured a special verdict finding that there was no illegal entry into the plaintiff's premises and that excessive force was not used. On appeal, the plaintiff cites two errors: 1) the trial court's refusal to require an affirmative answer to the first question, which concerned illegal entry, and 2) the trial court's denial of plaintiff's motion for a new trial.

The focus of both grounds for appeal is the plaintiff's contention that, as a matter of law, the police officers entered into plaintiff's business without consent or other authorization. This court has reviewed the transcript of the trial and all documents submitted by both parties. We find that the district court fully and accurately addressed this issue when denying plaintiff's motion for a new trial. Consequently, we adopt that decision, a copy of which is attached, as the decision of this court.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 81-C-1302

STEPHANIE ERON,

Plaintiff,

v.

CITY OF MEQUON, et al.,

Defendants.

DECISION and ORDER

The plaintiff in this action has moved for a new trial. The motion will be denied.

The plaintiff sought relief under 42 U.S.C. § 1983 for alleged violations of her constitutional rights by police officers who entered her restaurant to investigate suspected liquor law violations and allegedly used excessive force when they arrested her for obstructing their investigation. The jury found against the plaintiff on the issues of illegal entry and excessive force.

The plaintiff challenges as contrary to law the jury's determination that there was no illegal entry and asserts that the court should have found that there was an illegal entry as a matter of law. The plaintiff claims that "on the evidence it was undisputed that the entry was through a locked door without a warrant and that the police were requested on more than one occasion to vacate the premises." Since none of the exceptions to the 4th amendment's warrant requirement apply, according to the plaintiff, the warrantless entry was illegal.

There are two problems with the plaintiff's argument. First, the plaintiff mischaracterizes the evidence when she states that entry was "through a locked door." The door to the restaurant was locked when the police first arrived on the scene. However, the evidence was clear that the police did not break the door down; rather, they knocked repeatedly, and eventually the door was unlocked and opened to them by Michelle Michaels, a waitress at the restaurant.

Second, the plaintiff's list of exceptions to the warrant requirement is incomplete in that it does not include cases where consent is given to entry on and search of private premises—an exception to the warrant requirement that is clearly recognized in the case law. *See, e.g.,* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Vale v. Louisiana, 399 U.S. 30, 35 (1970). The question whether consent has been given to a search is generally a question of fact. *Schneckloth,* 412 U.S. at 248-49; United States v. Sells, 496 F.2d 912, 914 (7th Cir. 1974); United States v. Young, 471 F.2d 109, 111 (7th Cir. 1972). In this case, I continue to believe, as I did at the time of trial, that the evidence concerning consent was in conflict and that the issue was properly left to the jury as the trier of fact. I also believe that there was ample evidence to support the jury's determination that the plaintiff, through her agent Michelle Michaels, did in fact consent to the police officers' entry into the restaurant.

The evidence at trial included a tape recording made by one of the officers as the incident in question was occurring; the tape demonstrated that the officers knocked repeatedly at the door of the restaurant. The door was eventually opened by Ms. Michaels. The officers asked where Mrs. Eron was; Ms. Michaels said she was in the kitchen.

There was some conflict in the evidence as to what happened next, i.e., whether the officers proceeded to the kitchen by "barging in" despite Ms. Michaels' protests or whether they peacefully followed Ms. Michaels to the kitchen. However, there was substantial evidence to support the latter version of events. As indicated by the transcript of the tape it was only later, after one of Mrs. Eron's employees had already refused to cooperate with the officers and had given his name as "Joe Blow," that the officers were asked to leave the premises.

The jury was instructed that they should decide the issue of consent by looking at the circumstances of the officers' entry into the restaurant, including such matters as representations made by the officers and protestations, if any, made by the plaintiff or her agents. The plaintiff made no objection to these instructions. Given the evidence as summarized earlier and the governing principles of law, the jury's determination that there was no illegal entry was clearly not against the weight of the evidence. *See* United States v. Griffin, 530 F.2d 739 (7th Cir. 1976) (consent can be shown by words, gesture, or conduct); *Sells*, 496 F.2d at 914 (when a third party consents to search, question is whether he or she reasonably appeared to the officers to have authority to consent); *Young*, 471 F.2d at 111 (defendant's attempted rescission of consent when it appeared search might incriminate him did not render original consent invalid).

The plaintiff argues that "in view of the warrantless entry," her arrest and the alleged use of excessive force were unlawful as "fruit of the posionous tree." Wong Sun v. United States, 371 U.S. 471 (1963). Given my determination regarding the question of illegal entry, this argument is without force. The plaintiff offers no other reason to upset the jury's finding that there was no use

of excessive force. In my opinion that finding had support in the evidence and may not be disturbed. I also see no necessity to grant a new trial "in the interest of justice" as requested by the plaintiff.

Therefore, IT IS ORDERED that the plaintiff's motion for a new trial be and hereby is denied.

Dated at Milwaukee, Wisconsin, this 9 day of June, 1983.

/s/ *Myron L. Gordon*
Senior U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Civil Action
Case No. 81-C-1302

STEPHANIE ERON,

Plaintiff,

vs.

CITY OF MEQUON, TIMOTHY BRAATEN, Individually and in his official capacity as Chief of Police of the City of Mequon, RICHARD SCHNELL and JACK HOCKINSON and JOHN DOE and RICHARD ROE, individually and in their official capacities as police officers of the City of Mequon Police Department,

Defendants.

MOTION FOR NEW TRIAL

NOW COMES the plaintiff Stephanie Eron by her attorneys, Robert E. Sutton and Walter F. Kelly, pursuant to Rule 59 of the Federal Rules of Civil Procedure and moves the Court for a new trial for the following reasons:

1. The answer to Question 1 of the Special Verdict is contrary to law and the trial court erred in failing to answer the question yes;

2. The verdict with respect to answers to all the questions is contrary to the weight of the evidence; and

3. In the interests of justice.

Dated at Milwaukee, Wisconsin, January 11, 1983.

SUTTON & KELLY

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